No. 91-587

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In The

Supreme Court of the United States

October Term, 1991

THE INDEPENDENT INSURANCE AGENTS OF AMERICA, INC.; NATIONAL ASSOCIATION OF CASUALTY & SURETY AGENTS; NATIONAL ASSOCIATION OF LIFE UNDERWRITERS, INC.; NATIONAL ASSOCIATION OF PROFESSIONAL INSURANCE AGENTS; NATIONAL ASSOCIATION OF SURETY BOND PRODUCERS; PROFESSIONAL INSURANCE AGENTS OF PENNSYLVANIA, MARYLAND AND DELAWARE, INC.; INDEPENDENT INSURANCE AGENTS OF DELAWARE; THE DELAWARE ASSOCIATION OF LIFE UNDERWRITERS; and AMERICAN COUNCIL OF LIFE INSURANCE,

Petitioners,

v.

CITICORP,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Petitioners misstate the purpose of Section 4 of the Bank Holding Company Act.

II. Whether the Federal Deposit Insurance Corporation and State bank regulators together constitute an adequate framework for the proper regulation of state-chartered banks and their subsidiaries.

III. Whether the Delaware insurance legislation represents a prudent design for regulation of bank-owned insurance interests.

IV. Whether the Delaware insurance statute threatens any vital interests of Petitioners.

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Respondents-Intervenors, the State of Delaware, the State Bank Commissioner and the Delaware Bankers' Association, respectfully pray that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit be denied.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on June 10, 1991. The time for filing petitions for a writ of certiorari was extended by Order of this Court dated August 28 and 29, 1991, to October 8, 1991. Jurisdiction is conferred upon this Court by 28 U.S.C. sec. 1254(1).

COUNTER-STATEMENT OF THE CASE

The State of Delaware and the Delaware Bankers' Association adopt the statement of Respondent Citicorp as if set forth in full herein.

REASONS FOR DENYING THE PETITION

The decision of the court of appeals was correct.

This petition presents no question which has divided the lower courts. Nor, despite the exaggerated assertions of the Petitioners, is there presented an issue of national importance.[1] Petitioners, insurance industry trade groups, claim that the decision below will result in "enormous, deleterious consequences" for the Federal Reserve, the federal banking system and consumers. Pet. at 7. The

[1] On November 27, 1991, Congress passed the Federal Deposit Insurance Corporation Improvement Act of 1991, S. 543, Conference Report, 102d Cong., 1st Sess., 137 Cong. Rec. H11,761, H11,793 (daily ed. Nov. 26, 1991). As of this writing, it had not been signed by the President. The Act would amend the Federal Deposit Insurance Act, and is not relevant to or dispositive of any of the issues presented by this petition for certiorari.

gravamen of Petitioners' argument is political in nature. They seek to have this Court separate insurance from banking by inflammatory references to unrelated banking or political events such as the recent spate of Savings and Loan failures. They charge that "[t]he mixture of banking and insurance is a dangerous brew." Pet. at 7.

Rather than creating any such hazardous economic conditions for the banking system, the Delaware statute imposes multiple safeguards against intermingling the insurance and banking aspects of the banking division or subsidiary. There is no gap in supervision created by the absence of Board[2] intervention in the action of the insurance division, department or subsidiary of the bank. On the contrary, both the State regulatory authorities and the FDIC continue to monitor and supervise the transactions of the subsidiary. Either regulator may compel divestiture for any challenge to the safety and soundness of the institutions involved.

Relief such as is sought by Petitioners is unwarranted.

I. PETITIONERS MISSTATE THE PURPOSE OF SECTION 4 OF THE BANK HOLDING COMPANY ACT

In the case below and in its application for this writ, the Petitioners consistently look to the Bank Holding Company Act (the "BHCA") and the Board, as the federal regulator with primary regulatory authority under the

[2] We note that the Federal Reserve Board has not joined in, or filed its own petition for a writ of certiorari seeking to overturn the Second Circuit decision, but has obtained leave to file a brief in opposition thereto.

BHCA, as a check on the activities of state-chartered banks and their subsidiaries. The issue of whether the BHCA authorizes the Board to regulate the activities of state-chartered banks was directly addressed by the Second Circuit Court of Appeals in *Independent Insurance Agents of America, Inc. v. Board of Governors*, 890 F.2d 1275 (2d Cir. 1989), *cert. denied*, ___ U.S. ___, 111 S. Ct. 44 (1990) ("*Merchants*"). In *Merchants*, the Second Circuit accepted the interpretation of the BHCA advocated by the Board. It held that the limitations on the activities of bank holding companies defined by section 4 of the BHCA (12 U.S.C. sec. 1843) do not circumscribe the activities of state-chartered banks owned by holding companies. In fact, the *Merchants* decision merely re-affirmed what had been established law and Board interpretation since the inception of the BHCA. Thus, the predictions by Petitioners of "dire consequences" flowing from this re-affirmation are not sustainable.

The BHCA has never been understood to act as a check on the authorized activities of state banks and their subsidiaries. Rather, it was designed to prevent the use of the multi-bank holding company as a device to evade restrictions in state banking laws. *Northeast Bancorp v. Board of Governors*, 472 U.S. 159, 172-73 (1985). As section 7 of the BHCA, 12 U.S.C. sec. 1846, makes clear, the BHCA was never intended to preempt state regulation of state-chartered institutions. Thus, the Second Circuit's decision merely restates the natural view of the BHCA held by the Board in *Merchants*: that section 4 of the BHCA regulates only the ownership and control of non-banking subsidiaries owned by holding companies and not banks *or*, in this case, their subsidiaries. *See Cameron*

Financial Corp. v. Board of Governors, 497 F.2d 841, 845 (4th Cir. 1974).

II. AN EXTENSIVE FRAMEWORK EXISTS FOR REGULATION OF STATE-CHARTERED BANKS AND THEIR SUBSIDIARIES BY THE FEDERAL DEPOSIT INSURANCE CORPORATION AND STATE BANK REGULATORS

Petitioners' arguments suggest that state banks and their subsidiaries have now been empowered to run roughshod over the national interest in the maintenance of a safe and sound banking system. In reality, however, both prior to the enactment of the BHCA and today, state banks and their subsidiaries have operated in a regulatory environment which protects the safety and soundness of the nation's banking system.

The Delaware State Bank Commissioner, like corresponding local regulators in all other states, is charged by the state legislature with primary responsibility for the safe and sound operation of banks chartered by the State of Delaware. 5 *Del. C.* sec. 121. *See Board of Governors v. Investment Company Institute*, 450 U.S. 46, 59 n. 25 (1981). In connection with the exercise of his supervisory authority, he conducts regular examinations of state-chartered banks, and regulates the scope and nature of their investments and inter-affiliate transactions. Indeed, no facet of bank business is free from the regulatory control of the Bank Commissioner. Consistent with his role as the primary regulator of state-chartered banks, and with the BHCA, the State Bank Commissioner retains plenary authority under the Delaware Bank Insurance Powers Act ("BIPA") to supervise the activity of an insurance

division or subsidiary of a bank whenever he determines that its operation will materially and adversely affect the safety and soundness of the bank. 5 *Del. C.* sec. 121(e)(1).

At the federal level, the FDIC has been charged by Congress with ensuring the safety and soundness of insured banks and protecting the federal deposit insurance funds. 12 U.S.C. sec. 1813(q)(3). Congress has granted the FDIC broad powers to regulate the activities of state banks. The FDIC has promptly moved to exercise this authority when, in its view, such regulation was necessary to prevent risk to the deposit insurance fund. *See, e.g.*, 12 C.F.R. sec. 337.4 (regulation of securities activities by subsidiaries of state banks); 12 C.F.R. sec. 332.1 (certain insurance activities inconsistent with purposes of federal deposit insurance law). This broad FDIC responsibility for the safety and soundness of insured banks contrasts sharply with the Board's limited authority under the BHCA to prevent "the formation of a financially unsound bank holding company," but *not* to regulate "the day-to-day financial soundness of the subsidiary banks." *Board of Governors v. First Lincolnwood Corp.*, 439 U.S. 234 (1978). The Board's attempt here to expand its jurisdiction to the activities of a division or department of a state-regulated bank is not only unauthorized by the BHCA, but is contrary to this Congressional scheme of bank regulation.[3]

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[3] The shared regulatory responsibility of the chartering authority and the FDIC was recognized by Delaware and is reflected in the history of BIPA. The FDIC's proposed regulation concerning insurance activities was examined for guidance in the drafting of BIPA. 50 Fed. Reg. 23,964 (1985).

(Continued on following page)

Contrary to Petitioners' claims, the Second Circuit opinion does not create a regulatory vacuum which threatens the safety and soundness of our banks. Rather, both Delaware – under the careful system of regulation found in BIPA and elsewhere in its law – and the FDIC can and will protect the safety and soundness of Delaware banks engaging in insurance activities.

III. THE DELAWARE INSURANCE STATUTE IS AN EXAMPLE OF PRUDENT STATE REGULATION

Despite the fact that state banks are subject to the regulatory supervision of the FDIC and local regulators, Petitioners contend that the decision below will open the floodgates for irresponsible state legislation. However, the Delaware statute is a model of prudent regulation, and belies such exaggerated assertions.

(Continued from previous page)

Regulations promulgated by the Delaware Bank Commissioner pursuant to BIPA require that "if any such bank or trust company proposes to act as insurer then there shall be filed with this office a copy of a written communication from the bank or trust company to the Federal Deposit Insurance Corporation ("FDIC"), informing the FDIC of the nature and scope of the proposed activity." Delaware Bank Comm'r Reg. No. 5.761.0007 N.C. (Nov. 1, 1990). Delaware has consistently acted in good faith to take into account the Congressionally-delineated interests of the appropriate federal agency within the existing scheme of shared regulation.

The Delaware statute fashions a comprehensive regulatory framework intended to prevent threats to bank solvency from the exercise of insurance powers. It is designed to prohibit and prevent anti-competitive practices, and to maintain a level playing field between bank-affiliated insurers and insurers associated with other commercial entities.

Consistent with this goal, BIPA empowers Delaware state-chartered commercial banks to engage directly in insurance activities within a department or division of the bank, or indirectly through a wholly-owned subsidiary. To protect consumers and assure the safety and soundness of banks which choose to engage directly in the insurance business, BIPA established a precise scheme, discussed in the Opinion below, *Citicorp v. Board of Governors*, 936 F.2d 66, 70 (2d Cir. 1991). It expressly separates the insurance operations of a bank from the bank's exercise of other banking powers. Moreover, it provides for the regulation of such bank by *both* the Bank and Insurance Commissioners. In addition, BIPA creates a comprehensive design to ensure that bank customers are not pressed to utilize the products or services offered by banks and their insurance divisions or subsidiaries in return for provision of other products or services. This framework complements existing provisions of federal law and state law which prohibit tying arrangements. For example, the insurance operations of a subsidiary of a bank empowered to engage in the insurance business under the statute may not use information taken from an insurance contract presented to the parent bank in connection with a loan transaction, and may not discriminate in providing credit against entities which compete with

the bank or its affiliates. 5 *Del. C.* sec. 767. These banks may not accept an insurance application directly related to a loan application until a commitment is made on that loan. 5 *Del. C.* sec. 929(b). Moreover, no Delaware bank may condition the provision of credit, services or products upon consumption of bank products or services, or upon a requirement to provide products or services to the bank or to refrain from doing so with competitors. 5 *Del. C.* sec. 929(a).

In addition to these anti-tying provisions, the Delaware legislation affords to individual and commercial consumers who purchase insurance in connection with an extension of credit from a bank, a 30-day right of policy cancellation, and an opportunity to obtain less costly coverage elsewhere with a full refund of the premium paid. 5 *Del. C.* sec. 930(a), (e). All of these rights are superimposed upon existing refund rights which the insured may have by contract, law or regulation. 5 *Del. C.* sec. 930(g).

Additionally, all banks engaged in insurance activities must disclose that the policies written are not direct liabilities of the bank and that only insurance division (or subsidiary) assets are available to pay policies or claims. 5 *Del. C.* sec. 930A. In order to prevent any possible evasion of the consumer protections afforded by the legislation, the tying prohibitions, disclosure requirements and refund and cancellation rights enjoyed by consumers who purchase insurance from banks or their affiliates are extended to third parties unrelated to the banks or affiliates who may have received the name of a potential insurance customer from a bank or its affiliate. 18 *Del. C.*

sec. 2304. In short, and contrary to the insurance industry's contention here, consumers enjoy great protection. Further, the insurance industry is not disadvantaged, since BIPA expressly prohibits the tying of insurance to other bank products.

The Delaware statute was enacted after nearly two years of legislative debate and amendment with ample comment and input from representatives of every segment of the community, including the insurance industry and the Federal Reserve Board. The "dire consequences" predicted by Petitioners for the banking industry, the insurance industry and consumers in the event this Court denies the relief they seek are purely illusory. BIPA and the dual regulation of the state banking industry as it now exists effectively preclude such results.

IV. THE DELAWARE LEGISLATION DOES NOT THREATEN THE VITAL INTERESTS OF PETITIONERS

The insurance industry Petitioners also claim that the Delaware statute threatens the "vital interests" of insurers. They contend that, as members of and contributors to the state insurance guaranty fund, they risk substantial economic loss if bank insurance entities fail because of the financial weakness of their parent banks. This argument ignores the fact that insurance operations owned by Delaware banks are, by law, members of the state insurance guaranty fund. Thus, payment of assessments will fall upon bank-insurers to the same extent as any other insurance companies. Therefore, upon the insolvency of an insurance company, bank-owned

insurers will be called upon to make contributions to the guaranty funds like other insurance companies. Moreover, bank-insurance subsidiaries (and divisions) are separate and distinct, in that they maintain separate assets, liabilities, and books and records. They sustain regulation by the Insurance Commissioner, who is explicitly empowered to seize an insurance operation to protect its safety and soundness. *See* 5 *Del. C.* secs. 124, 767, 908A; 10 *Del. C.* secs. 1102A, 2305A.

Bank ownership of insurance operations does not endanger the guaranty funds. In reality, banks and their wholly-owned insurance entities are more pervasively regulated, and thus safer and less likely to threaten guaranty funds, than other insurers. The motives of the insurance industry Petitioners are transparent. Although they contend that their "vital interests" are threatened, fear of competition lies at the root of their complaints. Fear of competition is not a "vital interest" which this Court should protect.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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